

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 07-0308
Sales Tax
For Tax Years 2004-05**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-3-7; IC § 6-2.5-8-8; IC § 6-8.1-5-1; Commissioner's Directive # 24 (July 2004).

Taxpayer protests the assessment of sales tax.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is in the rental business, with customers in Indiana and other states. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for sales tax and a ten percent negligence penalty. Taxpayer protests a portion of these assessments and the negligence penalty. Further facts will be provided as required.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer's first point of protest is the imposition of sales tax on rentals to a customer which provided Taxpayer with an out-of-state exemption certificate. Specifically, that customer provided a Kentucky exemption certificate. Taxpayer did not charge sales tax on rentals to that customer. The Department determined that Taxpayer should have charged sales tax on rentals to that customer, since that customer did not provide a valid Indiana exemption certificate. The Department refers to IC § 6-2.5-3-7(b), which states:

A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, *in the form prescribed by the department*, that the acquisition is exempt from the use tax. (*Emphasis added.*)

The Department also refers to IC § 6-2.5-8-8, which states:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. *The person shall issue the certificate on forms and in the manner prescribed by the department.* A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;

(2) organizations which are exempt from the state gross retail tax under IC 6-2.5-5-21, IC 6-2.5-5-25, or IC 6-2.5-5-26 and which are registered with the department under this chapter; and

(3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

(c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt. (*Emphasis added.*)

Form ST-105 is the Department's standard Indiana exemption certificate, and is the form prescribed by the Department for compliance with IC § 6-2.5-3-7(b) and IC § 6-2.5-5-8. Also, the tax years at issue are 2004 and 2005. For the first six months of 2004, the Department had form ST-136A, which was the Indiana Out-of-State Purchaser's Sales Tax Exemption Affidavit. As of July 1, 2004, form ST-136A was no longer an effective document for out-of-state purchasers to claim an exemption from Indiana sales tax. As explained in Commissioner's Directive # 24 (July 2004), out-of-state taxpayers were required to use ST-105 to claim sales tax exemptions.

Taxpayer has only provided the Kentucky exemption certificate. The customer did not provide an ST-136A for the first six months of 2004, nor did the customer provide an ST-105 for the last six months of 2004 or for 2005. These are the necessary forms to comply with IC § 6-2.5-3-7(b) and IC § 6-2.5-8-8. There are no provisions for accepting the exemption certificates from another state. Taxpayer has not met its burden under IC § 6-8.1-5-1(c) on this point of protest.

Taxpayer's second point of protest is that the audit report includes \$942.50 in fuel sales which Taxpayer already included in its sales total for Indiana. This is a matter for verification by

supplemental audit. If the supplemental audit confirms that there is a redundancy, it will be corrected.

In conclusion, a seller is required to receive an Indiana exemption certificate when not collecting sales tax from a customer. IC § 6-2.5-3-7(b) and IC § 6-2.5-8-8 both require that an exemption certificate be on forms prescribed by the Department. The Kentucky exemption certificate is not a form prescribed by the Department. Taxpayer has not produced such forms for this customer, therefore, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c). The inclusion of fuel sales previously reported by Taxpayer will be reviewed in a supplemental audit.

FINDING

Taxpayer's protest is denied regarding the Kentucky exemption certificate and sustained on the fuel sales subject to verification by the supplemental audit.

II. Tax Administration—Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax year in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full

amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is sustained.

WL/LS/DK December 3, 2007.